APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,814

February 4, 1959

NATIONAL LABOR RELATIONS BOARD, *Appellant*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Appellee*.

Petition for Enforcement of an Order of the National Labor Relations Board.

Before: BONE, ORR and BARNES, Circuit Judges.

ORR, Circuit Judge:

The National Labor Relations Board, hereafter Board, determined in a proceeding before it that respondent International Association of Machinists, Lodge 942, AFL-CIO, hereafter Union, had committed unfair labor practices in that it had attempted to illegally restrain and coerce the employees of the Alloy Manufacturing Company, hereafter Alloy, as prohibited by section 8(b)(1)(A) of the National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C.A. § 158 (1952), and that Union had violated section 8(b)(2) of the Act by attempting to cause Alloy to discriminate against its employees in violation of section 8(a)(3).

Section 8(b)(1)(A) provides that: "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7"; section 7 provides that: "employees shall have the right to self-organization, . . .

to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all of such activities . . .".

Section 8(b)(2) provides that: "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . ." and subsection (a)(3) provides that: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure . . . to encourage or discourage membership in any labor organization . . .".

The Board after entering its order petitioned this court for its enforcement.

Alloy manufactures and sells truck bodies, semi-trailers and allied products. In 1954 Union made an effort to become the bargaining agent of Alloy's employees. Pursuant to proper initiation procedure, the Board conducted an election which resulted in the rejection of Union as the bargaining agent. In the spring of 1955, Union renewed its efforts to get a collective bargaining agreement by direct approach to Alloy rather than to its employees and presented to Alloy a proposed agreement to that effect together with a demand that all employees become members of Union. Alloy refused to so agree on the ground that such an agreement could not be validly executed, absent the selection of its employees of Union as such agent. But 1 or 2 out of a total of employees ranging from 8-13 were members of Union at the times the demands were made. At no time has Union maintained that it represented a majority of the employees. In making its demand on Alloy that it designate Union as its bargaining agent it informed Alloy that: "We are doing things different this year. We are . . . going direct to the employer, and we'd like to have you sign the contract and then go tell your men that you're Union and they will be very happy to be in the Union."

Further meetings and discussions were had and Alloy continued to refuse to sign the agreement. On June 20, Union requested that Alloy be placed on the Spokane Central Labor Council's "We Do Not Patronize List" and that was subsequently done. The Union also made appeals to Alloy's customers to stop doing business with Alloy. On June 23 the company filed a petition with the Board seeking a second representation election.

On August 16, Union began picketing the plant, and continued to do so for almost a year and until proceedings were instituted with the Board. After picketing began, five employees did not report for work and were subsequently replaced.

Alloy continued to operate though on some occasions truck drivers refused to unload supplies, and some of its customers notified Alloy that their business relations with Alloy were being affected by the picketing.

The Union resisted the proposal of Alloy for an election, informing the Board that it did "not claim to represent any of (Alloy's) employees." The Board nevertheless ordered an election which was held. No votes were cast for Union; six were cast against it. In the face of this unanimous rejection, Union continued its course of conduct consisting of picketing, listing and customer appeals.

In holding that Union violated section 8(b)(1)(A), the Board found that Union had exerted economic pressure on Alloy for the purpose of forcing Alloy to recognize Union as exclusive bargaining agent notwithstanding it represented no employees of Alloy.

The Board's holding that Union violated section 8(b)(2) and (1)(A) was on the ground that its activities were engaged in for the purpose of enforcing its demand for a security agreement.

Union concedes that it violated section 8(b)(2) of the Act in that it attempted "to cause an employer to dis-

criminate against an employee in violation of subsection (a)(3)" by picketing to secure a union shop agreement when it had no majority. It asserts, however, that the facts fail to establish a violation of 8(b)(1)(A) and further maintains that the "Do Not Patronize List" and the customer appeals violated no provisions of the Act. The order of the Board is said to be too broad to the extent that it prohibits conduct not actually engaged in or threatened to be engaged in by Union.

[1]In the light of Union's concession that by its conduct it violated section 8(b)(2) it becomes unnecessary to determine whether it violated 8(b)(1)(A) in respect to the use of pickets to force acceptance of a union security agreement since Union has acquiesced in the entry of a decree enforcing the order of the Board in this respect.

The objection of Union first made in this court that the finding of the trial examiner upon which the Board based its order that picketing for the purpose of achieving designation of it as the exclusive bargaining agent violated section 8(b)(1)(A) cannot be entertained by us because Union took no exception to that finding of the examiner—indeed it filed no objections to the report of the examiner at all. It merely requested permission to make an oral argument before the Board which was denied. Section 10(e) of the Act which governs the jurisdiction of this court provides that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such obligation shall be excused because of extraordinary circumstances." No attempt has been made to excuse the failure. Section 10(e) has been construed to require that objections must be raised at all stages so that Board process may be invoked to the full extent available. As an illustration of the necessity of taking exception, in Marshall Field & Co. v. N.L.R.B., 318 U.S. 253 (1943) the Supreme Court held that a general objection "that the

examiner had erred 'in making each and every recommendation'" did not satisfy the requirement of 10(e) emphasizing the "salutory policy of 10(e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order. (318 U.S. at 255-256)" In N.L.R.B. v. Seven-Up Bottling Co. of Miami, 344 U.S. 344 (1953) the Supreme Court held that no issue not raised as an exception to the examiners' intermediate report could be considered by the court. This court has held that "objection" as used in the statute is not limited to procedural or factual matters, but extends to all issues. N.L.R.B. v. Pappas & Co., 203 F.2d 569 (9 Cir. 1953). To the same effect is N.L.R.B. v. Giustina Bros. Lumber Co., 253 F.2d 371 (9 Cir. 1958) where an issue as to whether certain picketing violated section 8(d) of the Act was abandoned before the Board and later attempted to be raised in this court. See also the Board's regulation stating that: "No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings." 29 C.F.R. § 102.46(b) (1949).

Union having consented to a decree restraining it from picketing for a security agreement and Union having failed to make any objection to the finding by the examiner and a recommendation that it be restrained from picketing to enforce exclusive recognition leaves us no other choice than to sustain the order of the Board as far as it respects picketing. We need not consider whether there was a violation of any other sections with respect to the picketing. The order of the Board as far as it relates to the restraint of picketing by Union will be enforced.

There remains for consideration the finding of the Board that the action of Union in including Alloy in its "We Do Not Patronize" list and by urging others not to do business with Alloy exercised restraint and coerced Alloy's employees. The trial examiner had found that such activities

were not prohibited. The Board did not adopt that finding. We are required to consider this action of the Board because Alloy filed objections to the findings of the examiner on these issues.

We are not in accord with the Board's action in reversing the examiner. We think he reached the correct conclusion and are so impressed with his reasoning that we quote a portion of what he said: "When invited or urged to join a union an employee may pause to reflect upon the advantages or disadvantages inherent in his choice. Alloy's employees have considered the question and have decided that they prefer not to have representation. As in all such decisions self interest has its play. Workers sometimes, at least, join unions because they hope to gain some economic benefit and sometimes are deterred from doing so by comparable considerations. It is true that business operations employing union labor will be preferred by some customers and avoided by others solely upon the basis of that factor. This circumstance operates to benefit employees or not to depending upon the choice made in relation to the predilections of their employer's clientele. Because their employer's business may be affected by such a choice it follows that the employees themselves have an economic stake in the reaction of customers to their designation of a bargaining representative or refusal to do so. So it may well be said that the selection of a union representative is often or perhaps always made in a climate not entirely free from elements which have a coercive quality. These elements are a part of the very fabric of industrial and commercial life quite beyond the reach of any conceivable statutory remedy. I do not doubt the right of the Respondent to publicize by appropriate means the fact that Alloy's employees are not represented by a union and even to persuade others by peaceful and truthful propaganda not to patronize Alloy for that reason if the

persuasion is attempted to be accomplished by no more than the expression of 'views, argument, or opinion'."[1]

"I do not understand that publication of the 'We Do Not Patronize' list is more than the expression of an opinion, and I would place the requests of business organizations that they not patronize Alloy in the same category."

We consider the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the 1st amendment guarantying freedom of speech. These aspects are more protected than picketing which although within said area, "exerts influences and produces consequences different from other modes of communication." Hughes v. Superior Court, 339 U.S. 460, 465 (1950). In order to adopt the Board's finding as to the illegality of Union's action now under consideration, we would need a clearer mandate from Congress than the general terminology of the applicable statutes. If such a mandate be given, it then would be the time to consider any constitutional questions raised.

The order of the Board is ordered enforced to the extent that it prohibits picketing and set aside in so far as it prohibits listing of Alloy on the "We Do Not Patronize" list and the importuning of customers not to patronize Alloy.

(Endorsed:) Opinion. Filed Feb. 4, 1959.

PAUL P. O'BRIEN, *Clerk*.

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[1] § 8(c) of the Act reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No: 15,814

ORDER

April 9, 1959

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Respondent.*

Re: Motion to Stay Paragraphs 1(a) and 2(a) and (b) of the Decree Pending Application for Certiorari

Before: BONE, ORR and BARNES, Circuit Judges.

Respondent, International Association of Machinists, Lodge 942, AFL-CIO, has moved this Court for an order staying Paragraph 1(a) and Paragraphs 2(a) and (b) of the decree in the above entitled matter pending application for a writ of certiorari and final determination of the cause by the Supreme Court of the United States. In a formal "opposition" filed with us the National Labor Relations Board does not oppose a stay of the *notice-posting* requirement of the decree as it relates to peaceful picketing but opposes any other stay by this Court.

Paragraph 1(a) of the decree requires that respondent shall cease and desist from:

> "Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, . . . by picketing for the purpose of obtaining recognition of Alloy's employees

at a time when it does not represent a majority of them."

In its motion respondent frankly avows, inter alia, that "should picketing of Alloy's premises be resumed, its purpose will be confined to (1) persuading the employees of Alloy to join respondent, and/or (2) persuading customers of Alloy not to patronize it." The sort of picketing (described in Paragraph 1(a)), as did the prior picketing, would probably inflict business loss on Alloy, which in turn might force it to accede to respondent's illegal objective.

The Board suggests, and we agree, that to subject Alloy and its employees to this kind of pressure to select an unwanted representative would, if the Board's view be ultimately sustained, result in a pro tanto impairment of the Act's policies.

It is ordered by this Court that the *portion* of that *notice* which was required by our decree to be *posted*, a copy of which is attached to the decree and which reads as follows:

> "We will not restrain or coerce the employees of Alloy Manufacturing Company, in the exercise of rights guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all the activities guaranteed thereunder, by picketing for the purpose of obtaining recognition of Alloy's employees at a time when it does not represent a majority of them."

be stayed in order to permit respondent to apply for a writ of certiorari, and until final determination of the cause by the Supreme Court of the United States.

In all other respects respondent's motion is denied.

(Endorsed:) Opinion. Filed April 9, 1959.

PAUL P. O'BRIEN, *Clerk*.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,814

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Respondent*.

Decree Enforcing, in Part and Setting Aside in Part, an Order of the National Labor Relations Board

Before: BONE, ORR and BARNES, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated November 4, 1957. The Court heard argument of respective counsel on December 10, 1958, and on February 4, 1959, being fully advised in the premises, handed down its decision enforcing in part and setting aside in part the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Respondent, International Association of Machinists, Lodge 942, AFL-CIO, and its officers, representatives, agents, successors and assigns shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, hereinafter called the Act, by picketing for the

purpose of obtaining recognition of Alloy's employees at a time when it does not represent a majority of them.

(b) Attempting, by picketing, to cause Alloy to discriminate against Alloy's employees in violation of Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent Union's business offices, meeting halls, and all places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region of the National Labor Relations Board, Seattle, Washington, shall after being duly signed by official representatives of the Respondent Union, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of the notice attached hereto marked "Appendix" to the aforesaid Regional Director for posting, Alloy Manufacturing Company willing, at all locations where notices to the Company's employees are customarily posted. Copies of said notice to be furnished by the said Regional Director, shall, after being duly signed by authorized representatives of the Respondent, be forthwith returned to the Regional Director for such posting.

(c) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this Decree, as to the steps the Respondent has taken to comply herewith.

It is FURTHER ORDERED, ADJUDGED, AND DECREED that order of the Board is set aside in so far as it prohibits

listing of Alloy on the "We Do Not Patronize" list and the importuning of customers not to patronize Alloy.

March 10, 1959

/s/ PAUL P. O'BRIEN
Paul P. O'Brien
Clerk

March 11, 1959

A True Copy

Attest: PAUL P. O'BRIEN
Clerk

(Seal)

APPENDIX

NOTICE

TO ALL MEMBERS OF INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO
PURSUANT TO

a decree of the United States Court of Appeals enforcing in part and setting aside in part an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended we hereby give notice that:

> WE WILL NOT restrain or coerce the employees of ALLOY MANUFACTURING COMPANY, in the exercise of rights guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all the activities guaranteed thereunder, by picketing for the purpose of obtaining recognition of ALLOY's employees at a time when it does not represent a majority of them.

WE WILL NOT, by picketing attempt to cause ALLOY to enter into an agreement with us containing union shop provisions, until such time as we are the lawfully constituted bargaining representative of ALLOY's employees.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
LODGE 942, AFL-CIO

(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.